STATE OF MICHIGAN

COURT OF APPEALS

CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL ORDER OF POLICE, DAVID KOST, and LABOR PROGRAM, INC.

Plaintiffs-Appellants,

V

INGHAM COUNTY BOARD OF COMMISSIONERS and INGHAM COUNTY SHERIFF,

Defendants-Appellees.

UNPUBLISHED
November 18, 2003

No. 241999
Ingham Circuit Court
LC No. 01-093762-CL

Before: O'Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In this action alleging breach of a collective bargaining agreement, plaintiffs appeal by right the trial court's grant of summary disposition to defendants pursuant to MCR 2.116(C)(10). Because we conclude that the trial court properly awarded summary disposition to defendants, we affirm.

I. Facts and Proceedings

On May 4, 2001, plaintiff David Kost, an Ingham County corrections officer, and his Fraternal Order of Police (FOP) representative, Laurie Siegrist, attended a disciplinary meeting conducted by Ingham County Undersheriff Matt Myers, one of Kost's superior officers, to address Kost's behavior at a prior training session. Shortly after the meeting started, Kost responded to a question posed by Myers, and Myers told Kost that he could not understand Kost's response because Kost was chewing gum while he was speaking. Myers, therefore, directed Kost to spit out his gum, but Kost refused. After Kost refused additional directives, Myers asked Kost if he understood that he was being ordered to spit out his gum. Kost affirmed that he understood that he had been ordered to spit out his gum. Because of Kost's refusal to comply with his order, Myers immediately suspended Kost without pay and ended the meeting. At a subsequent "predetermination" disciplinary meeting, Kost stated that he believed that Myers' order was not a "lawful order" that Kost was bound to follow, given that departmental rules and the union contract do not prohibit employees from chewing gum on duty. The next day, Myers suspended Kost for two weeks without pay, taking into account Kost's prior disciplinary record.

After unsuccessfully challenging Kost's suspension through the contract's grievance procedures, plaintiffs filed their complaint in the instant matter, alleging that the discipline did not meet the just-cause requirements of the collective bargaining agreement, that the penalty was excessive, and that, accordingly, defendants had breached the terms of the collective bargaining agreement. Following discovery, defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that Kost violated the departmental rule requiring department members to obey lawful orders of their superiors and that, therefore, just cause for the suspension existed. In opposition to defendants' motion, plaintiffs contended that disobedience of Myers' order could not result in discipline because Kost's behavior was not directly related to job performance and because behavior during a disciplinary hearing is protected by the Public Employment Relations Act (PERA), MCL 423.201 *et seq*.

The trial court granted defendants' motion, distinguishing Kost's act of chewing gum from an employee's speech while engaged in protected activity:

> Chewing gum is a gesture, and I think I'm entitled to take judicial notice that in context of a meeting such as this it is a gesture of disrespect towards a superior officer, and when the superior officer gives an order to throw out the gum, that order should be obeyed, and when that order is defied, there is just cause for discipline.

Additionally, in light of Kost's disciplinary history, the trial court concluded that the two-week suspension was not excessive. This appeal followed.[1]

II. Standard of Review

This Court reviews de novo the trial court's decision concerning a motion for summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion pursuant to this rule tests the factual support for a claim. *Id.* In reviewing the documentary evidence submitted by the parties to determine whether a genuine issue of material fact exists, this Court views the facts in a light most favorable to the nonmoving party. *Id.*

III. Analysis

First, plaintiffs assert that the department improperly disciplined Kost because the department's rules do not prohibit gum chewing on duty and because Myers' order did not relate to the performance of Kost's job duties. These arguments lack merit. Departmental rule 102.04.7 provides that "[a]ll Department Members will comply with verbal or written orders issued by Superiors. This will include any lawful orders relayed from a Supervisor or Senior Officer by a Member of the same or lesser rank." This rule does not limit Kost's obligation to

[1] Plaintiffs do not appeal the trial court's decision concerning the length of Kost's suspension.

follow orders to only those orders that enforce specific departmental rules or orders that directly relate to the performance of job duties.[2]

Next, plaintiffs argue that Kost cannot be disciplined for his behavior during a disciplinary hearing because his activity at a disciplinary meeting is protected by the PERA. Plaintiffs claim that if a public employee incurs discipline for actions taken while the employee is engaged in protected activity,[3] the just-cause requirement of the contract is not satisfied. We decline to address this claim, as the Michigan Employment Relations Commission (MERC) has exclusive jurisdiction over whether defendants violated plaintiffs' rights under the PERA.[4] *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 359; 616 NW2d 677 (2000). The "'MERC alone has jurisdiction and administrative expertise to entertain and reconcile competing allegations of unfair labor practices and misconduct under the PERA.'" *Id.*, quoting *Rockwell v Crestwood School Dist*, 393 Mich 616, 630; 227 NW2d 736 (1975).

Contrary to plaintiffs' assertions, *Bay City School Dist v Bay City Ed Ass'n, Inc*, 425 Mich 426; 390 NW2d 159 (1986), does not require a different result. In *Bay City*, our Supreme Court stated that an employee may pursue arbitration of a breach of contract claim while the employee's PERA claims are pending in the MERC, "unless the contract protects what the PERA prohibits or the arbitrator's decision conflicts with a prior MERC decision." *Id.* *Bay City* does not permit an employee to litigate a PERA claim in circuit court. Accordingly, the trial court lacked jurisdiction to decide whether defendants violated Kost's PERA rights.

Because plaintiffs have not shown there is a genuine issue of material fact concerning whether defendants complied with the contract's just-cause requirement, the trial court properly granted defendants' motion. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163-164; 645 NW2d 643 (2002), citing *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999).

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[2] Plaintiffs have also submitted Siegrist's affidavit to show that she could hear and understand Kost while he was chewing gum during the meeting and that she did not believe Myers had difficulty understanding Kost. Her assertions have no bearing on the propriety of Myers' order and, therefore, do not create a genuine issue of material fact.

[3] MCL 423.208, § 9 of the PERA, provides public employees the right "to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice." Pursuant to § 10 of the PERA, a public employer cannot "interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9."

[4] Although the trial court did not address the issue of subject matter jurisdiction, subject matter jurisdiction cannot be waived, *People v Gonzalez*, 256 Mich App 212, 234; 663 NW2d 499 (2003), and may be addressed by this Court for the first time on appeal, *Davis v Dep't of Corrections*, 251 Mich App 372, 374; 651 NW2d 486 (2002).

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder